Poppin Fresh Pies, Inc. *and* National Production Workers Union, Local 707. Case 13-CA-19008

May 29, 1981

DECISION AND ORDER

On December 18, 1980, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, concurring in part and dissenting in part:

Although I agree with my colleagues that the General Counsel failed to prove by credited evidence that Respondent violated Section 8(a)(3) of the Act by its discharge of Cristin and Hortencia Rios, I disagree with their adoption, *pro forma*, of the Administrative Law Judge's rejection of the General Counsel's alternative contention that Respondent violated Section 8(a)(1) in its discharge of the Rioses. Contrary to my colleagues, I find that the exceptions adequately place in issue the Administrative Law Judge's rejection of the 8(a)(1) discharge theory, as the General Counsel excepted to his failure to find that the Rioses were discharged in violation of Section 8(a)(3) and (1).[4] I would proceed, therefore, to consider the alternative 8(a)(1) theory, which is based on credited testimony and has been fully litigated. Since Respondent elicited from its own witnesses the evidence supporting the 8(a)(1) discharge theory, this evidence is not in dispute.[5] I would reverse the Administrative Law Judge because the credited testimony clearly shows that the Rioses were discharged for engaging in protected concerted activity.

Respondent makes various types of pies. Cristin Rios was employed as a dough divider and Hortencia Rios, his wife, as an assembler, in the freezer pie production department. This department produces fruit and cream pies. Respondent frequently requires its employees to work overtime to meet increased and seasonal production needs, to compensate for time lost due to equipment malfunctions, and, most commonly, to use up fruit remaining at the end of the shift.

On August 6, 1979, Gemini Walker, commissary supervisor, observed Cristin Rios leaving his work station shortly before the end of the regular shift. According to the credited testimony of Walker, a witness for Respondent, Walker asked Rios where he was going and Rios replied that he was going home, or "la casa." Walker demanded an explanation and Rios said, ". . . me no work no more overtime for this company, this company no pay

[1] We find it unnecessary to pass on the issue of whether the affidavit of Antonio Ramirez was properly received pursuant to Sec. 804(B)(5) of the Federal Rules of Evidence, in light of the Administrative Law Judge's failure to give any evidentiary weight to the affidavit, which we affirm. See *Sure Tan, Inc. and Surak Leather Co.*, 234 NLRB 1187, 1190 (1978).

[2] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's finding that Respondent did not independently violate Sec. 8(a)(1) by its discharge of Cristin and Hortencia Rios, i.e., allegedly because they concertedly refused to work overtime in furtherance of a dispute concerning overtime pay.

We disagree with our colleague's conclusion that this finding has been placed before us for determination by virtue of the General Counsel's exception stating that "Respondent discharged Cristin and Hortencia Rios because of their union activities, as alleged in the complaint in violation of Section 8(a)(3) and (1) of the Act." It is clear from the exception itself, the argument in support of it, and the other exceptions addressed to the discharge of these two employees that the General Counsel is contending only that they were terminated because of their union activities. Nowhere, either in the exceptions or supporting brief, does the General Counsel refer or allude to any other basis for finding a violation concerning their discharge. Thus, we conclude, contrary to our colleague, that the General Counsel has not excepted to the Administrative Law Judge's above finding.

[4] Cf. *Alexander Dawson, Inc. d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978); *Ackerman Manufacturing Company*, 241 NLRB 621 (1979) (relying on credited testimony uncontroverted by respondent, the Board found an unlawful offer of benefits although the conduct was neither alleged in the complaint nor raised by exceptions).

[5] The Administrative Law Judge rejected the 8(a)(1) discharge theory partly on the ground that it was not timely presented. Counsel for the General Counsel notified Respondent, after the conclusion of the hearing, of their intent to include in their brief the argument that testimony Respondent elicted from its own witnesses established that the Rioses were discharged for engaging in protected concerted activities. This argument was consistent with the charge filed herein, alleging a discharge because of "union/or protected concerted activity," and with the complaint, which alleges that Respondent discharged the Rioses because they "engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection." The evidence supporting the 8(a)(1) discharge theory was produced by Respondent by way of defense to the allegation of an 8(a)(3) discharge. In its brief to the Administrative Law Judge, Respondent took the opportunity to address the merits of the 8(a)(1) theory. Inasmuch as the facts involved were fully litigated and the legal theory addressed in the briefs, I see no obstacle to our considering this violation. *AMC Air Conditioning Co.*, 232 NLRB 283, 285-286 (1977). See also *Nebraska Bulk Transport, Inc.*, 240 NLRB 135, 154-156 (1979), and cases cited there.

overtime, and me and Hortencia is going la casa." At that point Walker stopped the line and asked Rose Steele, an acting supervisor who speaks fluent Spanish, to serve as an interpreter. Through Steele, Walker asked both Cristin and Hortencia Rios to remain and work the limited overtime necessary to use up the blueberries. Cristin Rios again refused, repeating his claim that the Company did not pay him for overtime. Hortencia said, "Whatever Cristin says, I say." A third employee, Antonio Ramirez, told Walker he had to leave with the Rioses as they had driven him to work. The Rioses, accompanied by Ramirez, left the premises and Walker, Steele, and a sanitation worker assumed positions on the line, completing the overtime in about 12 minutes.

The following day Walker met with Daniel Herzog, the assistant plant manager, and told him of the events of the previous evening. Walker recommended that Cristin Rios be discharged because, "He just said he was not going to work right in full view of the other people, he just shut me down." Walker recommended that Hortencia also be discharged since she allied herself with Cristin. Herzog accepted Walker's recommendations and later that same day both Cristin and Hortencia were fired.

When unrepresented employees concertedly cease work to protest unsatisfactory working conditions, their actions are protected by the Act. *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962). That protection is not lost beause the work stoppage is limited to overtime hours or unaccompanied by indications of what the employees intend to do in the future should the employer not yield to their demands.[6] A single concerted refusal to work overtime is presumptively protected strike activity and that presumption is deemed rebutted "when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action."[7]

From the facts detailed above, I conclude that the Rioses were unlawfully discharged for refusing to work overtime in protest of a perceived failure to pay overtime pay.[8] Respondent presented no evidence proving that intermittent or recurring activity was contemplated by the Rioses and the record affirmatively reveals that Respondent discharged the Rioses without inquiring into their intentions concerning future refusals to work overtime. Unlike the Administrative Law Judge, I find *J. P. Hamer Lumber Company, Division of Gamble Brothers, Inc.*,[9] cited by the General Counsel, to be applicable. There, as here, employees refused to work overtime in order to bring their overtime grievance to the attention of management. The Board found that their discharge for such conduct violated Section 8(a)(1). I am frankly perplexed by the manner in which the Administrative Law Judge distinguishes *J. P. Hamer*. In dismissing the 8(a)(3) allegation, the Administrative Law Judge credited testimony that Respondent discharged the Rioses after they refused mandatory overtime, based on a pay dispute. In distinguishing *J. P. Hamer* and dismissing the 8(a)(1) theory, however, the Administrative Law Judge resurrects the previously discredited testimony of the Rioses to show that their actual motive in refusing to work overtime was to be with their children. I question the relevancy of the Rioses' subjective reasons for refusing to work overtime, since the Administrative Law Judge found this reason was not advanced by the Rioses and thus it played no role in Respondent's decision to discharge them. Thus, as the credited evidence stands, the discharges were motivated by the Rioses' concerted protest of Respondent's overtime pay practice and therefore violated Section 8(a)(1) of the Act.

[6] *First National Bank of Omaha*, 171 NLRB 1145 (1968), enfd. 413 F.2d 921 (8th Cir. 1969).

[7] *Polytech, Incorporated*, 195 NLRB 695, 696 (1972). In *Polytech*, the Board reconciled the presumption fashioned in *First National Bank of Omaha, supra*, with the holding in an ealier case, *John S. Swift Company, Inc.*, 124 NLRB 394 (1959), enfd. 277 F.2d 641 (5th Cir. 1960), and concluded that an intermittent or recurring refusal to work overtime is inconsistent with genuine strike activity which contemplates that the striker put himself in the position to be replaced.

[8] Respondent's witness Steele testified that Cristin Rios had complained to her about not receiving the proper amount of overtime pay. Respondent's own records show that Rios was not paid for 30 minutes of overtime he work approximately 2 weeks before his discharge.

[9] 241 NLRB 613 (1979).

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: This case was heard in Chicago, Illinois, on February 19, 20, March 17, 18, and 19, 1980, pursuant to a charge filed by National Production Workers Union, Local 707,[1] herein the Union, and complaint issued on September 25, 1979.[2] The complaint, as issued, alleges that Poppin Fresh Pies, Inc., herein the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein the Act, by interrogating employee Antonio Ramirez regarding his union activities and sympathies, and violated Section 8(a)(3) and (1) of the Act by discharging employees Cristin and Hortencia Rios. The General Counsel also contends as an alternate theory that the Rioses were terminated in violation of Section 8(a)(1) of the Act. The Respondent, in answering

[1] The charge was filed on August 19, 1979.

[2] All dates hereinafter are in 1979 unless otherwise specified.

the complaint, denied commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, submitted by the General Counsel and the Respondent, have been carefully considered. Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Ohio corporation, at all times material herein, has maintained an office and place of business in Oak Forest, Illinois, where it has been engaged in the preparation and retail sale of food. During the calendar year ending December 31, 1979, the Respondent, in the course of conduct of its above-described business operations, derived gross revenues in excess of $500,000 from the retail sale of food. During the same period, the Respondent, in the course and conduct of its above-described business operations, purchased and received at this facility, goods valued in excess of $50,000 shipped directly from points outside the State of Illinois.

The complaint alleges, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(2) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Respondent, with facilities at Elk Grove Village and Oak Forest, Illinois, manufactures pies and other food products which are sold through its own retail outlets.

In September 1978, the Union unsuccessfully participated in a representation election conducted among certain employees at both the Elk Grove Village and Oak Forest facilities.[3]

Alice Perez[4] served as the union election observer at both locations while still employed by the Respondent.

With the Union, Perez returned to the Respondent's Elk Grove Village commissary on three occasions in May and a similar number of times in June to resume the Union's organizational drive. After the freezer pie operation was transferred from Elk Grove Village to Oak Forest on July 2, with those supervisors and employees who wished to follow their jobs.[5] Perez also continued the campaign at Oak Forest, visiting that location twice in mid-July and again in early August. During these visits, Perez followed a practice of parking her car off company property, near the respective commissary driveways. There, she distributed union literature and organization cards and spoke to employees as they arrived for and left work.

2. The discharges of Cristin and Hortencia Rios; alleged related act of interference

The General Counsel contends that Cristin and Hortencia Rios, a married couple, were unlawfully terminated on August 7 because of their support for the Union after members of supervision had seen them in conversation with Perez outside the Elk Grove Village and Oak Forest commissaries where they were successively assigned; after they were overheard by a supervisor talking favorably about a union in a commissary cafeteria, and after later being coercively interrogated concerning their union activities.[6] The General Counsel also asserts that Antonio Ramirez, another employee closely associated with the Rioses, also was unlawfully interrogated about his union activities. The Respondent denies knowledge of the Rioses' union activities at the time of discharge and maintains that they were terminated solely because of their insubordinate refusal to work a brief period of mandatory overtime at the conclusion of their shift on August 6.

Union organizer Perez testified that she first visited the Elk Grove Village facility in early May in connection with the Union's resumed campaign, when she distributed a number of authorization cards among the Respondent's employees. During that month, she also made two more visits to the Elk Grove facility, principally on May 31, when she returned with two other union representatives, at which time she and the others stood by the driveway giving out literature for an hour. While they were so engaged, Perez saw the Elk Grove Village commissary manager, Arthur White, watching them from the vicinity of the employees' entrance for intermittent periods totaling 5 to 10 minutes. On an earlier visit, Perez had seen White observing her at work from the truck dock, situated at the innermost point of a recessed area about 52 feet from the building's exterior. Although insisting that White did then watch her activities, Perez conceded that his opportunity to see her from the dock was limited to when she was standing directly in front of the dock as the brick sidewall blocked off lateral vision. However, when she returned on May 31 with the two other representatives to pass out campaign literature,

[3] The unit voted at the election was as follows: All full-time and regular part-time production, maintenance, drivers and warehouse employees employed at the Respondent's present locations in Elk Grove Village and Oak Forest, Illinois, but excluding office clerical employees, technical employees, guards and supervisors, as defined in the Act.

[4] Perez, employed by the Respondent as a production worker from February 1976 until her resignation in October 1978, had been variously assigned to work at the Elk Grove Village and Oak Forest commissary and was personally acquainted with supervisors and production employees at both locations. After leaving the Respondent's employ, she was retained by the Union as a organizer.

[5] The General Counsel does not contend that the transfer of work from Elk Grove Village to Oak Forest was unlawfully associated with the Union's organizational campaign.

[6] Counsel for the General Counsel, in their post-hearing brief, advanced an alternate theory that the Rioses' were discharged in violation of Sec. 8(a)(1) of the Act because of their concerted refusal to work overtime to protest the Respondent's asserted failure to pay overtime premium pay.

there was no such visual restraint. On that occasion, White moved about 30 feet from the employees' entrance toward the employee parking lot, in the direction of Perez. There situated, he, too, spoke to employees as they left work and, from a distance, smiled at Perez.

In mid-June, when Perez again returned to organize at the Elk Grove Village facility, she was met near the parking lot by White who, having approached from some distance, told her, "Oh, its you again? You don't give up. Leave the workers alone, they don't need you." Perez did not reply but saw that this encounter was being watched from the dock area by a commissary supervisor, Gemini A. Walker.[7]

Sometime between June 6 and 25, Perez gave Cristin Rios about six or seven union cards and some literature to distribute among the Respondent's employees. Rios did give out a number of cards and some literature while away from the commissary and, on June 26, he returned his own signed card to Perez outside the Elk Grove Village facility. There is no evidence that any member of supervision or management had observed Cristin Rios while he was engaged in any of the above activities.

Cristin Rios had been hired as a dough divider in the freezer pie production department at Elk Grove Village in June 1977, under the name Nestor Ibarra. His wife, Hortencia, also a native of Mexico, was hired in March 1978 under the surname of Rivera as an assembler in the same department. Both continued to perform their orginal assignments while with the Respondent.[8]

When the freezer pie operation was transferred to Oak Forest, effective July 2, the Rioses elected to go there, although a substantially longer trip from home. It is not disputed that the Respondent lost about half its work crew when this transfer occurred, many Elk Grove Village employees choosing not to make the longer journey. As before, Cristin Rios continued to drive his car to work accompanied by Hortencia, who worked the same shift as her husband at both locations, and by Antonio Ramirez, a friend and fellow employee.[9]

After the transfer of the freezer pie operation to Oak Forest, Perez visited there on July 16 and 18 to continue the campaign. She and Cristin Rios related that they and Hortencia Rios had spoken together in front of the Oak Forest facility on July 16 around 12:30 p.m., when the Rioses arrived for work. Cristin Rios represented that while they were talking, he noticed that they were being watched by Daniel Herzog, assistant commissary manager at Oak Forest, for a span of about 4 minutes. At the time, Herzog was standing in a recessed truck-loading area some distance away and gave no sign of recognition. Perez and Hortencia Rios, on the other hand, testified that they were not seen talking together by Herzog until August 2, when, as will be described, Hortencia Rios signed a union card. However, according to Perez, they were seen together at Oak Forest in mid-July by Lynn Jeske Malinowski, whom she considered to be a supervisor.[10] Malinowski suddenly disappeared and, soon thereafter, Perez noticed someone peeking through a window.[11]

The Rioses testified that during their 9 p.m. break on July 24,[12] they were seated at a table in the commissary cafeteria with Ramirez when Cristin Rios declared in Spanish that if there was a union, the Company would not cut the employees' hours and days of work.[13] Suddenly, from a nearby table, Supervisor Rose Steele interjected, also in Spanish,[14] that the Company did not want the Union and that if the Union did not come in, the Company would not cut down on their work. When Cristin Rios, in response, asked Steele why it was that sometimes the employees worked 6 days a week and sometimes 4, Steele merely repeated what she had said before, that the Company did not want the Union and if the Union did not come in, the employees' workdays would not be cut. According to the Rioses, when this incident occurred, Steele was seated at a table with Supervisor Linda Bonello and a since-terminated English-speaking production employee.[15]

[7] Walker, a former production employee, had been a supervisor at Elk Grove Village since the preceding February. On July 2, he transferred to the Oak Forest facility where he directly supervised the freezer-pie production department where the Rioses were assigned and, as will be discussed, later recommended their discharge. Walker denied having seen White talking to Perez. At the time of the hearing, Walker had advanced to commissary manager at one of the Respondent's Michigan facilities.

[8] Cristin Rios' duties required that he take dough from a stainless steel tub, roll it into elongated forms which he fed through a cutter, reducing the dough to blocks of 8 square inches. Hortencia Rios put the square dough blocks through rollers where the next worker on the line used the flattened result to top off two-crust pies.

[9] While employed at Elk Grove Village, the Rioses' hours were from 7 a.m. to 3:30 p.m., but at Oak Forest, they worked from 1 to 9:30 p.m.

[10] Malinowski, a production employee in the summer of 1979, was in a supervisory position at one of the Respondent's retail outlets at the time of the hearing.

[11] Malinowski denied having seen Perez talk to the Rioses, but testified that in early August, while on the loading dock at Oak Forest, she noticed a car containing two people. One of the occupants waved, attracting her attention. Malinowski then called Herzog out to the dock, telling him that she believed Perez was in the car. Herzog looked but could not see that far. Malinowski told him that there was another person in the car but did not know who it was. Herzog sent her back to work and closed the doors to the dock. Herzog in turn, related that on August 9, about 1 p.m., 2 days after the Rioses' discharge, Malinowski called him on the intercom and announced that a car with two occupants was parked across the street from the commissary, had been there for some time, and the occupants appeared to be staring in. Herzog went to the dock area and saw a blue car some distance away, but could not see who was inside. However, the driver waved and he waved back. He then shut the large overhead door to the dock. The car then backed up to the other dock area. Herzog also closed that dock door, and sent Malinowski back to work. Returning to the dock area, Herzog saw the car at a closer distance and recognized the driver as Perez. He also saw another man in the car whom he did not know but who was not Cristin Rios. As Herzog started back towards the building, closing the door behind him, he heard Perez call "chicken, chicken, chicken."

[12] Cristin Rios specifically remembered this date as his birthday.

[13] At the time, the Rioses and Ramirez had been talking loudly at their table about the uneven work schedules afforded them. During one week, they had been required to work from Monday through Saturday, while the next week they were permitted to work only Monday through Thursday. The employees also had been sent home from both the Elk Grove Village and Oak Forest facilities when there was no fruit available for use in piemaking.

[14] Steele, fluent in Spanish, was employed by a different employer at the time of the hearing, and, in the summer of 1979, was a supervisor at one of the Respondent's other facilities. However, she then frequently was at the Elk Grove Village and Oak Forest commissaries to assist with employee training and with supervision.

[15] Steele denied the Rioses' accounts of the above conversation and related that in mid-July, during a break, she and Supervisor Bonello were at a table in the cafeteria at a time when virtually all the freezer pie production employees, including the Rioses, were there. While Steele and

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The Rioses and Perez testified that on August 2, they were observed together by a company official while Hortencia Rios was signing her authorization card. On this occasion, the Rioses, as they drove into the company parking lot, saw Perez seated in her parked car near the outside of the commissary. The Rioses parked their van and went to talk to Perez while their passenger, Ramirez, went inside the commissary. Perez emerged from her car as the Rioses approached, and asked how everything was going in the plant. The Rioses replied that things were all right and inquired if Perez was also organizing the Oak Forest commissary. Perez answered that she was, noted that Hortencia Rios had not yet signed a union card, and asked if she was ready to do so then. When Mrs. Rios said that she was, Perez produced an authorization card which Hortencia Rios signed on the roof of Perez' automobile. Perez then saw Assistant Commissary Manager Herzog, Malinowski, and some female employees watching them from the shipping dock some 15 yards away. Spotting them, Perez told the Rioses to go inside the plant as the Company seemed to know what was going on and she did not want to get them in trouble. The workers and Malinowski, by the loading dock, waved at Perez after the Rioses had left.

The next workday, after the above-described incident, was Monday, August 6, as there was no production performed at the plant on Friday, August 3.[16] Both Rioses and Ramirez worked their regular shift on August 6, from 1 to 9.30 p.m. Cristin Rios testified that about 9:15 p.m., his supervisor, Walker, asked if he could remain that evening to work overtime and, at approximately 9:30, made the same inquiry of Hortencia Rios. While the other employees in that department, also asked to work overtime, agreed to remain, both Rioses replied that they could not stay that night because their children were alone and there was no one to take care of them.[17] Accordingly, Walker, through Steele as interpreter, told them that it was all right for them to go home, and they left accompanied by Ramirez who traveled with them.

Early the next afternoon, when the Rioses and Ramirez arrived together to work, they did not find their timecards in the rack and automatically went to the office area. There, Herzog told the Rioses to go into his office and wait while he brought in Walker and Steele. Ramirez was told to remain in the outer office. When Steele and Walker entered, Herzog, with Steele interpreting, told the Rioses that there was no more work for them because they did not work overtime the night before. He continued that this also was because they had been going around the commissary talking about the Union. Gemini Walker echoed Herzog's remarks that there was no more work for them because they had refused to work overtime and because they had been talking about the Union within the Company. Walker then asked if they had signed union cards. Cristin Rios denied that he had signed such a card. The Rioses then were given forms to sign. These forms, entitled "Notice of Disciplinary Action," completed identically for both Rioses, showed that they were being terminated for having left their respective work stations without permission after having been asked to stay and finish production. Hortencia Rios refused to sign the form given to her. At first, she testified that she had been told that the form, which was entirely in English, meant that she was quitting. Later, in her testimony, she changed this and denied having been told that the form referred to her resignation from the Respondent. She explained that she did not sign the paper because she did not know what it contained.

Cristin Rios related that he, too, had refused to sign the document given to him until it was signed by Herzog. Herzog initially had refused to sign, claiming that he was only the assistant manager. However, he eventually did sign the form, followed by Rios.

After the Rioses left Herzog's office, they waited in the outer office while Ramirez was called in to meet with the same company officials. As Ramirez apparently had returned to Mexico by the time of the hearing, the General Counsel's evidence of what was said to him in the office in support of the complaint allegation that Ramirez had been unlawfully interrogated is based on Ramirez' pretrial affidavit which was received in evidence at the General Counsel's request under Rule 804(b)(5) of the Federal Rules of Evidence.[18]

In his affidavit, Ramirez stated that immediately after the Rioses left Herzog's office on the morning of August 7, he was called in from the anteroom to meet with Herzog, Walker, and Steele. Steele, as interpreter, was his direct communicant. She told Ramirez that the Company was good, the pay was good and, following a remark in English by Herzog, she asked in Spanish whether he had signed a union card. Although he had done so in the preceding May, Ramirez denied having signed a card.

Bonello were talking, the above-referred English-speaking employee asked Steele, from another table, what she thought of the Union. Steele replied that many years before, she had belonged to a union and personally had not cared for it. She did not like the idea of paying union dues, of going to union meetings, and of being fined for not attending. If out of a job, she would find one on her own and did not need a union to help her. No reference was made to any specific union either by the employee or by Steele. Steele denied having heard Cristin or Hortencia Rios ever say anything about a union.

[16] Production was down on August 3 because the commissary freezer was filled.

[17] Hortencia Rios explained that she and her husband had two young children who had been cared for by relatives and friends while they were at work. However, on August 5, the neighbor who most recently had been looking after their children had given notice that that was the last evening she would do so. Therefore, as August 6 was the first night that the children would be alone, it was more important than before to get home on time.

[18] This rule, in relevant part, provides as follows:

> Rule 804(b). Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (5) Other exceptions. A statement . . . having equivalent circumstantial guarantees of trustworthiness if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statements and the particulars of it, including the name and address of the declarant.

Steele told him that the Rioses had been fired because they did not work overtime. When Ramirez asked whether, in that case, he, too, would be fired, Steele replied that he still had a job but would have to work overtime if needed.

Ramirez' affidavit shows that as he left Herzog's office, a Chicago policemen, through Hortencia Rios, asked if he was from Mexico and requested to see his immigration papers. Hortencia Rios protested that it was unjust to call the police as they were not criminals. Ramirez and the Rioses then left the Respondent's premises, Ramirez having been directed to return to work the next day.[19]

The Rioses cited instances when they were not obliged to work overtime while at Elk Grove Village. Accordingly, the Rioses were excused from overtime on two occasions during their last 3 months at Elk Grove Village to enable Cristin Rios to attend English classes at a school, and Supervisor Steele testified that at Oak Forest, during the first week in July, the Rioses also had refused her request, while she was their substitute supervisor,[20] to work overtime because their babysitter would cost too much money. The Rioses were not disciplined for having left, although employees who remained worked until 2 a.m.[21]

The Rioses also disclaimed knowledge of the employee handbook provision that overtime was mandatory.

Supervisor Walker testified that on August 6 the freezer-pie department was producing blueberry pies and the Rioses were performing their customary jobs—Cristin Rios was working the dough divider and Hortencia Rios was running the top roller. Walker noted near the end of the shift that about 15 minutes of overtime would be needed to use up the remaining fruit. He explained that the Company had a firm, published policy requiring overtime, particularly where it was necessary to utilize remaining fruit, as fruit, if left in the machines tended to become unusable, creating a costly situation.

While Walker was watching the operation from a sideline before 9:30 p.m. that night, Cristin Rios left the line and started from the room. When Walker asked where he was going, Rios, answered partially in Spanish and English, that he was going home. In response to Walker's question as to what he meant when he said that he was going home, Cristin Rios declared that the clock outside said it was 9:30 p.m. and he would not work anymore overtime for the Company, as the Company did not pay him overtime. He and Hortencia were going home. When Walker assured him that there were only 10 to 15 minutes of overtime required to finish the work, Rios reported that there would be no overtime for Hortencia and himself. He was going home because the Company does not pay overtime.

Walker stopped the production line to call Steele to act as interpreter. He reminded Cristin Rios that the big clock on the production room wall showed that it was only 9:25 p.m. and his shift was not yet over. Cristin Rios replied that that clock was no good. The clock outside said that it was 9:30[22] and he and Hortencia were leaving.

When Steele arrived, Walker told her to ask Cristin Rios if he could stay the 10 to 15 minutes overtime to help finish production, pointing out that he knew the blueberries could not be left because they would be lost. Steele spoke to Rios in Spanish, but he twice more repeated that he and Hortencia would not stay because the Company does not pay overtime. Walker asked Steele to again request Cristin Rios to stay the extra 10 to 15 minutes—all that would be needed to finish the day's production. He then could go home and the other employees would clean up the room. Rios, however, replied that they were going home right then.

During this discussion, Walker had Steele ask Hortencia Rios the same questions. Hortencia shrugged and stated that whatever Cristin said, she said. When Walker had Steele again asked Hortencia Rios to remain, as only 10 or 15 minutes of overtime was necessary, she shrugged. When Steele translated Walker's warning that if the Rioses did not stay and help finish this overtime, they would be jeopardizing their jobs as there was no one else to help and the fruit could be lost, Cristin Rios shrugged and left with Hortencia Rios.

Despite Walker's denial during that incident that overtime had not been afforded, Cristin Rios persisted that he had worked overtime and had not been paid.[23]

Walker related that after the Rioses left, he was obliged to calm the other employees who were angry at their departure. Walker, Steele, and a sanitation worker took stations on the line and the overtime was completed in about 12 minutes, afterwhich the employees left for the night. Before leaving on August 6, Walker called

[19] In his affidavit, Ramirez also corrobrated so much of the Rioses' account of the July 20 incident as when Steele, from a nearby cafeteria table, told the Rioses that the Company did not need a union. Unlike the Rioses, he did not also state that Steele had promised that worktime would not be cut if the union failed to come in. Ramirez' affidavit also stated that on August 2, as Ramirez entered the commissary while the Rioses went to speak to Perez outside the Respondent's building, he saw Herzog watching the Rioses and Perez from the truck docking area. The significance of this affidavit will be discussed below.

[20] On that occasion, Steele was replacing Walker, then on vacation.

[21] The Respondent explains Steele's failure to discipline the Rioses for refusing overtime on that occasion as vacillation by a substitute supervisor.

[22] This reference was to the timeclock 30 yards down the hall and not visible in the production room where this incident occurred. In any event, according to Walker, the plant operated according to the time shown on the large electric clock in the production area, which was used to schedule shifts and breaks.

[23] At the hearing, the Rioses testified that they did not work overtime on August 6 only because there was no one else to look after their children. They did not connect their refusal to stay that night to an overtime pay dispute. However, elsewhere in his testimony, Cristin Rios did state that while the Company was supposed to pay overtime premium when employees worked more than 40 hours a week, there were two or three occasions where he was not properly paid for 10 to 15 minutes work past the end of his shift. On these occasions, when Rios went to the office to claim the extra money, whichever supervisor was present would keep his check stub and promise that he would be paid the difference later. However, he never received his money. Supervisor Steele recalled that Cristin Rios had told her that if they were going to work overtime that Saturday, July 2, as scheduled, he did not believe the Company would pay him for it. Steele had reassured him that he would be paid overtime as in the past. The Respondent conceded that a review of the Rioses' overtime records during June and July showed that Cristin Rios erroneously had not been paid for 30 minutes' overtime worked on July 24, the only admitted nonpayment. Hortencia Rios, who also worked the same overtime on July 24, was paid for the extra time and there is no contention that she was not paid for all due overtime.

Commissary Manager Carl Conti and told him of the Rioses' refusal to work overtime that evening. Conti told Walker that he would have no problem with whatever Walker decided to do.

The next day, Walker came to work an hour early and wrote out the "Notice of Disciplinary Action" forms later given to the Rioses to sign. When Herzog arrived at his office, Walker gave his account of what had happened the night before, emphasizing that the Rioses had gone home without excuse and had flatly refused the overtime. When asked by Herzog for a recommendation, Walker urged that the Rioses be discharged as, without excuse, they had refused to work overtime in the presence of the other employees, resulting in a temporary shutdown of the line. Hortencia Rios was included in this recommendation as she had taken Cristin's side. Walker argued that if the Rioses were not terminated, then anyone could refuse overtime and leave the Company stranded. However, Walker also recommended that Ramirez be permitted to keep his job as he had been passive and was dependent on the Rioses for transportation.

Herzog and Walker then looked into Cristin Rios' personnel file and found recorded an earlier incident of insubordination. Herzog agreed with Walker's recommendation to terminate the Rioses.[24]

When Walker returned to the office, the Rioses already were there. Walker told them that he wanted to speak to them in Herzog's office and left to find Steele to serve again as interpreter. Ramirez was asked to wait in the anteroom.

Inside Herzog's office, Walker gave Steele the two disciplinary forms and, at his request, she read them to the Rioses. Through Steele, Walker told the Rioses that they were being terminated for the reasons stated on the respective forms, for their actions the previous night when they had left their work stations without reason 5 minutes before the end of their regular shift. As they had abandoned their work areas before completing their duties, the Company had no alternative but to discharge them. Steele read the disciplinary notices to the Rioses in Spanish and then gave each their own copy to sign.

Cristin Rios tossed his notice on the desk and threw the pen across the desk at Herzog, beat his finger on the desk and declared that he was not going to sign anything and wanted his check. If the Company had no more work for him he wanted his check right then. Rios repeated this demand. Walker, through Steele, replied that there was no way that the Company could give him his money immediately as he knew that the pay checks issued from Minneapolis. Walker promised to make a phone call to attempt to have their checks flown in. Cristin Rios refused this offer, reiterating that he wanted his check that minute, and again beat on the desk. Hortencia Rios succeeded in calming him.

Hortencia Rios then asked why she, too, was being terminated as she had not received any prior disciplinary notices.[25] Walker replied that she had taken the same position as had Cristin. She was invited to return the next day and speak with the plant manager. However, for the present, she was terminated. Hortencia Rios declared that she would come in to speak with Conti the next day.[26]

Walker then asked Steele to tell the Rioses that he wanted them to clean out their lockers, gather their things, and leave the building as they were no longer employed. Instead, when the Rioses left Herzog's office they pulled up two chairs from along the outer office wall, placed them centrally, and the sat down in the middle of the main office area.

Ramirez then was summoned to the office. Walker, through Steele, told Ramirez that if he had a way of coming to work, would perform his duties, work overtime when requested, and be on time, he still had his job with the Respondent. Ramirez was asked if there would be any problems with this. Ramirez asked how he was going to get home that day if Cristin Rios was fired. Walker answered that he would excuse Ramirez for that day but that he should be ready for work the next day.

Ramirez asked why Walker did not fire him. He had been lying the night before; he was really driving his own car. Walker told Ramirez that he was not concerned about that. Ramirez had told him that he was riding with Cristin Rios and Walker took him at his word. Ramirez again asked why Walker did not fire him and asked, if he was fired, would Walker give him a letter for unemployment compensation. Walker answered that he had no control over that, did not know whether that office would give him unemployment compensation, and that it was not Walker's concern. Ramirez was told that if he wanted to work for the Company, he still had his job if he would be there every day on time and perform duties with overtime. Ramirez replied that he did not know and produced some check stubs that he claimed were not right. Walker told him that he could come back the next day and discuss that matter with Conti, which he did.

While talking to Ramirez, Walker opened the door to see whether the Rioses had left. He saw them seated in the middle of the outer office. Walker asked one of the secretaries through the intercom to call the police to get the Rioses to leave the building. The police arrived as the conversation with Ramirez concluded.

Ramirez continued to work for the Respondent until December 1979, when he was granted leave of absence to return to Mexico. Ramirez never came back and did not thereafter communicate with the Respondent.[27]

[24] The Respondent contends that the Rioses were discharged on August 7 solely because of their conduct during the preceding night and that the earlier insubordinate act, while a point of reference, was not a cause of discharge.

[25] At the hearing, Hortencia Rios, during cross-examination, also testified that she had not received any prior notices of disciplinary action. However, the Respondent's records show that Hortencia, in fact, previously had received a disciplinary notice for her inability to perform a production task.

[26] Hortencia Rios did not return after August 7 to speak with the plant manager.

[27] Walker's account of the events of August 6 was corroborated by Steele, who also joined Herzog in corroborating Walker's testimony concerning the Rioses terminal interview and the August 7 meeting with Ramirez.

The Respondent's witnesses, including Walker, Herzog, and Steele, denied having known of the Rioses' union activities and denied knowing that either had signed union cards at the time the decision was made to fire them.[28]

As noted, the Respondent contends that the Rioses knew of the Respondent's rule requiring mandatory overtime and that the Rioses were discharged for its breach.

3. The Respondent's policy concerning overtime

Walker testified that the freezer-pie department where the Rioses worked operated with about 11 employees who performed as a team producing 50 pies per hour. The team concept required that each employee be in place or else the entire production line must be shut down.

The machinery in the freezer-pie production room at Oak Forest was used for specific purposes at different times of each day. From 4 a.m. to 12:30 p.m. shells were made for the soft pies.[29] The sanitation crew performed a brush cleanup job for the freezer-pie operation from 12:30 to 1:30 p.m. Thereafter, the frozen food operation ran from 1 to 9:30 p.m. From 9:30 p.m. to 3:30 a.m., the sanitation did a total cleanup.

Walker emphasized that as the Respondent's operation was based upon quality and freshness, it was necessary to exhaust all fruit to make certain it is not lost. Leftover fruit not used by the production shift thereafter became unusable. To avoid this loss, additional worktime to enable use of the fruit was a requirement. Such overtime usually lasted 10–15 minutes, but sometimes extended to a maximum of 30 mintues.

Overtime could also result from an increased number of pie orders from some of the Respondent's own retail outlets throughout the Midwest, particularly during holidays.

Cleanup also might require overtime as production employees are expected to keep the floors clean and to do a rush cleanup when the run of one variety of pie is finished. This cuts into net production time.

The type of overtime the Rioses assertedly were discharged for refusing to perform, daily overtime to use up fruit, differs from overtime to meet increased orders in that the latter takes more worktime and often is anticipated and prescheduled. Before the Rioses' were discharged, daily overtime to utilize fruit occurred about once a week, although sometimes more frequently.

Walker testified that the Respondent's policy concerning overtime is explained to new employees and is referred to in the English and Spanish versions of the Company's employee handbook,[30] distributed to all employees, as applicable. In the English language handbook, the "overtime work assignment" provision is as follows:

> In the commissary, occasionally it will be necessary to schedule overtime. When this is the case, the overtime work shall first be offered to the person working the job. If the vacancy still exists, it shall be offered to all Commissary employees at work based upon seniority and qualifications. If the vacancy still exists, the employee on the job will be drafted to remain on the job for a reasonable amount of time.
>
> All overtime work must be approved by your Supervisor or Commissary Manager in advance of its being worked, in order for you to receive overtime pay.

Walker testified that he had discussed overtime with Cristin Rios when the latter was hired. On that occasion, he took Rios around the plant and explained the Respondent's daily operations, telling him that periodic overtime would be necessary. He asked if Rios had any problems with daily overtime or even overtime on Saturdays. Rios replied that he had no problem with overtime; he had children and needed the money for them. Walker also then told Cristin Rios that there would be times when it would be necessary to stay 10 to 15 minutes overtime to finish a day's production. Rios again replied that he liked overtime and needed the money for his children.

While they spoke in the cafeteria on that occasion, Walker showed Cristin Rios the English version of the handbook, explaining that the Company did not have one in Spanish. However, Walker suggested that Rios might take the book and have Alice Perez, then a coworker, go over it with him as she was fluent in both languages.

The requirement to work periodic overtime was a frequent subject of discussion during the course of production. Walker, corroborated by Cristin Rios, testified that toward the end of certain shifts, he and Cristin Rios would make gentlemen's bets as to what time the work would end when it did not appear that the fruit could be used up by 9:30 p.m.[31]

Walker related that it was not necessary to tell employees to stay behind to use up fruit in the machines as they were as aware of this requirement as he was.

The Respondent attempts to acknowledge requests by employees to be excused from specific overtime if the reasons offered are valid and if qualified replacements are then available. Such replacements may not include supervisors who customarily do not do production work. Sanitation employees, as used on the night of August 6 when the Rioses left, also are not considered qualified replacements as they do not have the food handlers' certificate issued after physical examination and are not trained in pie-making.

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[28] Steele, as described above, had her own account of the July cafeteria incident, contradictory to that of the Rioses.

[29] The term "soft pies" refers to cream pies as opposed to fruit pies.

[30] At the time the Rioses were hired, the Respondent did not have yet a Spanish version of the handbook at staff meetings. However, these were distributed in July 1978, while they were still employed.

[31] Walker testified that in his daily work with the Rioses, he was able to get along without using an interpreter. While not fluent in Spanish, Walker can make himself understood and had learned enough words from working with Spanish-speaking employees for general understanding. He felt the need for an interpreter on August 6 and 7 only because of the special, tense situation that had developed. Earlier, Cristin Rios and Walker had enjoyed a good rapport and had socialized away from the plant.

The record shows that while employed by the Respondent, the Rioses worked overtime, participating both in the brief daily overtime at shift's end and in longer, prescheduled overtime periods on weekends or for extended periods at the end of regularly scheduled hours.

Specifically, the Rioses' overtime records for June and July showed the following: On Saturday, June 2, Cristin Rios worked 8 hours of overtime while his wife was off. Both Rioses worked 8 hours of overtime, respectively, on the following Saturdays, June 9, 16, and 23. On Monday, June 25, both worked 3 hours and 20 minutes of overtime.

In July, they worked overtime as follows: On Monday, July 9, Cristin worked 10 minutes of overtime while Hortencia worked 15. On Wednesday, July 11, Cristin and Hortencia Rios, respectively, worked 40 and 45 of minutes overtime. On July 16, Cristin worked 2 hours and 25 minutes of overtime while Hortencia worked 2 hours and 15 minutes beyond her shift. On Tuesday, July 25, both Rioses worked 30 minutes overtime, while on Thursday, July 26, Cristin worked 7 minutes of overtime while Hortencia worked an additional 15 minutes. Both Rioses worked 12 minutes of overtime on Friday, July 27.

As an example of the Rioses' awareness of the need for a valid excuse to avoid overtime, Walker cited an instance where he had found it necessary to schedule overtime for Saturday, July 28. On the preceding Tuesday, when the overtime was announced, all employees, including the Rioses, had agreed to come in. However, on Friday, July 27, Cristin Rios told Walker that he and Hortencia could not work the next day because they had just received a letter in the mail from their attorney summoning them to his office that Saturday.[32] Walker told Rios to bring the letter from the immigration authorities with a Friday postmark in order to keep his job. Rios agreed to do so. However, when Monday came, Walker was given a letter from the Rioses' attorney, typed on his stationery, certifying that they had been to his office on July 28. Although this was not the letter Walker had requested, he accepted it and excused their absence.

Overtime pay practices were specifically discussed with employees at meetings called by James Lander[33] at Elk Grove Village and Oak Forest in February 1979. As had been the case at the July 1979 meetings when the handbooks were given out, an interpreter again was present and translated what was said.[34]

In June, additional meetings concerning overtime were held with employees, including those in the freezer-pie department at Elk Grove Village where the Rioses worked. Again, the interpreter translated into Spanish what was said. During the June meetings, certain changes in the overtime pay policy were announced, to become effective July 1. Previously, employees could be paid time and a half for Saturday work only if they had worked for 40 hours during the preceding Monday through Friday. Should they have worked fewer hours, they would be paid for Saturday at straight time. Under the changes announced in June and implemented on July 1, time and one-half is now paid for work on the sixth consecutive day, Saturday, and doubletime for work on the seventh consecutive day, Sunday, even where the employees had not worked 40 hours in the preceding 5 days.

Cristin Rios, contrary to the Respondent and his overtime record, denied that anything had been said to him concerning overtime when he was hired in 1977. He did not recall whether he ever had been told by the Company that overtime was required. He denied Walker's testimony that the latter had explained to him the reasons why overtime work was a necessary part of his job and that he had been told that overtime was required unless a valid excuse was presented. He denied knowing that it was a matter of company policy that overtime be worked at the end of the shift, if necessary, to use up the remaining fruit. Rios' testimony was evasive and inconsistent. He did not readily respond to questions on cross-examination as to whether the Respondent normally would keep employees working after the shifts ended to use up remaining fruit, and was evasive in answering whether he, in fact, had worked most of the overtime offered. At the same time, Cristin Rios agreed with Walker's testimony that, on occasion, they occasionally would make gentlemen's bets as to how much overtime would be required to use up the fruit. Nevertheless, the Rioses did not work overtime while at Elk Grove Village only to enable Cristin Rios to attend school,[35] and, at Oak Forest on Saturday, July 28, when they saw their lawyer on the immigration matter.

The Rioses' stated reason for refusing to work from 9:30 p.m. on August 6, was the need to be with their children who otherwise would be alone. Although this was testified to by both Rioses at the hearing, in their respective pretrial affidavits neither referred to their children as the reason why they had refused overtime on August 6.[36] The principal prior reference to their children was described by Steele, who related that in July, while substituting for Walker, she took no action against the Rioses when, on one occasion, they refused to work overtime because of babysitter problems.

B. *Discussion and Concluding Findings*

The General Counsel's contention that the Respondent knew that Alice Perez was working as an organizer for

[32] The Rioses testified that their attorney had directed that as soon as they received a certain letter from the immigration authorities, they should immediately contact him. As such a letter had arrived that Friday, they were directed by their lawyer to come to his office the next day.

[33] Lander is corporate director of employee relations with responsibility for wages, hours, and working conditions at Respondent's various facilities. Although based at the parent corporation, Pillsbury's Minneapolis, Minnesota, headquarters office, he spends about 10 to 20 percent of his time at Elk Grove Village and Oak Forest. He wrote the English version of the employee handbook and was responsible for the later preparation of the Spanish translation, overseeing its distribution in July 1978.

[34] Walker recalls that he and Cristin Rios were together at the February meeting at Elk Grove Village when the Respondent's policy of mandatory overtime was reiterated.

[35] Walker did not supervise the Rioses at Elk Grove Village and did not know whether they had been excused from overtime there to enable Cristin Rios to attend school, as claimed. Walker explained, however, that as half the work force was lost when the freezer-pie operation transferred to Oak Forest, replacements were easier to find at Elk Grove Village than they later were in Oak Forest.

[36] The Rioses, together, executed three pretrial affidavits.

the Union in the late spring and summer of 1979, when she spoke to the Respondent's employees in front of the Elk Grove Village and Oak Forest commissaries, is supported by the weight of the evidence. Even while employed by the Respondent, she had been active on behalf of the Union, serving as its observer to both facilities during the September 1978 election. When she resumed the Union's organizational drive at Elk Grove Village the following May, she was conspicuous in her activities. Either alone or with others, she repeatedly parked in full view near the Employer's premises, distributed union literature and spoke to employees as they arrived for work. On a number of occasions, she openly was watched by managerial personnel. Perez' testimony concerning her encounter with White in mid-June at Elk Grove Village, when he told her to leave the employees alone, was not contradicted. The Respondent's argument that Perez' various appearances at its premises could be attributed exclusively to social visits to relatives and friends still employed by the Respondent is unconvincing. Perez, as a former employee, was known to the Respondent's supervisors and employees at both Elk Grove Village and Oak Forest, and was personally recognizable. Although, as indicated by the General Counsel, she was not good at judging the distances from which she claimed her activities were observed, Perez was a forthright witness. Accordingly, it is concluded that in the months before the Rioses' discharge, the Respondent knew that Perez was actively organizing its employees on behalf of the Union. It also is found that Herzog saw Perez speaking with the Rioses on August 2, when Hortencia Rios signed her authorization card on the roof of Perez' car.[37] Although Perez also testified that she had been observed by Lynn Jeske Malinowski in mid-July while talking to the Rioses outside the Oak Forest commissary, and that she believed that she was being watched from a window, at the time in question, Malinowski was not yet a supervisor and her knowledge and actions, without more, were not then finding on or imputable to the Respondent. Therefore, I find that the only time the Respondent saw Perez talking to the Rioses was on August 2, when, from a distance, Herzog was able to see Hortencia Rios write something on the roof of Perez' automobile.[38]

However, although I have found that the Respondent, through Herzog, had seen Perez, a known union organizer, in conversation with the Rioses on one occasion, I do not conclude that the Rioses thereafter were unlawfully terminated, but, rather, as contended by the Respondent, that they were validly discharged for having refused to work mandatory overtime on the night of August 6.

Much of the General Counsel's case rests upon the credibility of the Rioses. I do not find that they, especially Cristin Rios, were believable.

Walker, the Respondent's principal witness, described in detail the Respondent's policies and practices concerning overtime and his version of the events leading to the Rioses' termination with impressive clarity and consistency. He explained the reasons why overtime is essential to the Respondent's business, the circumstances where it was required, and the steps taken to make these policies known to the Respondent's employees, including Cristin Rios. Noting that the Respondent must be concerned with considerations of freshness, the perishability of ingredients and, as described by Walker, increased seasonal demand for its products, in agreement with the Respondent, I find that overtime work is required as a condition of employment to use up remaining fruit at the end of the shift, and that overtime occasionally may be mandated for other purposes.

Cristin Rios, however, denied knowing that overtime was mandatory and denied knowing that it was a matter of policy that overtime be worked to use up remaining fruit at shifts end. He was evasive in answering whether he had worked most of the overtime previously offered. On the other hand, he did corroborate Walker's testimony that, on occasion, he and Walker would place gentlemen's bets as to the amount of overtime needed at the end of a shift to use up the fruit. He and Hortencia Rios, in fact, did work daily overtime to utilize fruit, and, as reflected in company records, participated in scheduled overtime on weekends. When Cristin Rios was assigned overtime work he could not perform for Saturday, July 28, he took measures to be excused. Cristin Rios' credibility was compromised by his overstated and inconsistent efforts to deny knowing of the Respondent's basic overtime policy and by his evasiveness while on the witness stand.

Hortencia Rios, found to be a more impressive witness than her hushand, apparently under his influence also refused to work overtime on the night of August 6. Contrary to the evidence, she also denied that she had received prior written warning from the Respondent. Although both Rioses gave the need to attend their children as the only reason why they could not work late on August 6, no reference to their children was made in their three pretrial affidavits. Accordingly, the Rioses are not credited where their uncorroborated testimony conflicts with that of other witnesses.[39]

As the Rioses are not independently credited, I accept the testimony of Rose Steele that she did not tell the Rioses and Ramirez, in the cafeteria or elsewhere, that the Respondent did not want a union and, if the employ-

[37] There is no evidence that the Respondent knew that Perez earlier had given union cards and literature to Cristin Rios for distribution, that Rios had distributed some of these materials and had himself signed and returned a union card. While Cristin Rios testified that he and his wife had been seen by Herzog while talking to Perez in mid-July, rather than in August, as testified by Hortencia Rios and Perez, I accept their account over that of Cristin as more reliable.

[38] The Respondent attempted to establish that Herzog did not see Perez at her organizing activities until August 9 two days after the Rioses were terminated, by introducing Herzog's testimony that on that day he was summoned to the dock area at Oak Forest by Malinowski, who had reported that the occupants of a car parked near the commissary were behaving suspiciously. Malinowski, also called to testify concerning this incident, gave a somewhat contradictory account and could place the event only in early August. However, as I have found from other evidence that the Respondent was aware of Perez' organizing activities at Elk Grove Village since at least June and had seen her in conversation with the Rioses on August 2, no particular significance is afforded to this testimony.

[39] In reaching the credibility resolutions herein, I have made allowance for the fact that the Rioses unfamiliarity with English language may have impeded their testimony.

ees did not support one, the Company would not cut their work days.[40]

Accordingly, it is concluded that the Respondent did not violate Section 8(a)(1) of the Act with regard to the incident in the cafeteria.[41]

Consistent therewith, I also credit Walker's corroborated accounts of the events of August 6 and 7 and conclude that the Rioses refused to work mandatory overtime on the former date and were not unlawfully interrogated in violation of Section 8(a)(1) of the Act on the latter date.

The principal remaining contention of union animus relates to the asserted interrogation of Antonio Ramirez on August 7. As Ramirez did not testify at the hearing, apparently having returned to Mexico before the hearing, evidence of this interrogation is predicated upon Ramirez' pretrial affidavit given before his departure and received pursuant to Rule 804(b)(5) of the Federal Rules of Evidence.[42] In his affidavit, Ramirez averred that on August 7, following the terminal interview of the Rioses, he next was called into Herzog's office where he was asked if he had signed a union card and told that the Rioses had been fired for not working overtime.

The General Counsel authenticated Ramirez' affidavit through union organizer Perez who testified that she was present when a Board agent prepared Ramirez' affidavit in Spanish. Perez saw Ramirez read, attest, and sign his statement, but she personally did not read the document until later in the day. The General Counsel declined to seek permission under Section 102.118 of the Board's Rules and Regulations, Series 8, as amended, as requested by the Respondent, so that the Board agent who had prepared the affidavit in another language could testify. This deprived the Respondent of an important opportunity at cross-examination not compensated for by the availability of Perez. Although Perez related that she was present while the affidavit was being prepared, the record does not show her involvement in the process and, as noted, she did not read the document until after it had been signed and she and Ramirez had gone to her office.

Although the Federal Rules of Evidence creating this exception to the rule against hearsay has been in effect since January 1975, the Board and courts have reacted cautiously and have either refused to receive affidavits in the absence of supporting testimony by the affiants[43] or, where such statements are made a part of the record, no evidentiary weight has been afforded.[44] In *N.L.R.B.* v. *McClure Associates, Inc., supra*, and *Sure-Tan, Inc., supra*, a showing that the affidavits had been prepared by Board agents did not prevent findings of hearsay. In *McClure Associates, Inc.*, the Court specifically noted, *inter alia*, that although the affidavit had been taken by a Board agent there had been no opportunity for cross-examination.

In the present matter, unlike *McClure Associates, Inc.*, there was ultimate compliance with the prior notice and other requisites of Rule 804, but Perez' supporting testimony in conjunction therewith provided merely a procedural minimum for receipt under this rule and, as noted, reliance has not traditionally been afforded such statements, absent substantiation. In these circumstances, the General Counsel's refusal to facilitate cross-examination by the Respondent of the Board agent who had prepared evidence importantly propounded in the General Counsel's direct case, can only serve to additionally detract therefrom. No weight, therefore, is given to Ramirez' affidavit and it is concluded that the Respondent did not violate Section 8(a)(1) of the Act by coercively interrogating him.

Although it has been found that the Respondent saw Perez, a nonunion organizer, talking to the Rioses on the next-to-last workday before they were discharged, this is not, in itself, sufficient in the context of the credited evidence to sustain the allegation of unlawful discharge. The Rioses were not leaders in the Union's organizational drive, and while, in June, Cristin Rios had distributed some union literature and had signed a card, there is no evidence that the Respondent knew this. As described above, Perez, while organizing, had visited both the Elk Grove Village and the Oak Forest commissaries on a number of occasions and had openly spoken to as many employees as possible in addition to the Rioses. That White, at Elk Grove Village, had told her to leave the employees alone does not presage unlawful discharge. From the credited evidence, there is little to warrant a finding that the Rioses were unlawfully terminated because of their support for the Union.

Rather, the evidence indicates that the Rioses were terminated on August 7 because of their refusal to work mandatory overtime during the preceding night when there was no other employee replacements available, in spite of warnings that disciplinary action would be taken, and although it would mean additional work for other employees. The Rioses do not deny this refusal. However, their stated reason, the need to go home to their children, is not accepted as they knew overtime was required, had been reassured that it could be completed in 15 minutes or less, and, as noted, such reason, although critical, had not been given in their pretrial affidavits. While the timing of their discharges was proximate to when the Rioses were seen talking to Perez, the same also was not less close in point of time to when they had refused mandatory overtime. For the above reasons, it is concluded that the discharges of Cristin and Hortencia Rios were not violative of Section 8(a)(3) and (1) of the Act.

The General Counsel, citing *J. P. Hamer Lumber Company, a Division of Gamble Brothers, Inc.*,[45] argues as an alternate theory that even if the Respondent's position is accepted, still, the Rioses were terminated in violation of Section 8(a)(1) of the Act because of their concerted re-

[40] In crediting Steele, it also is noted that at the time of the hearing, she was a disinterested witness as no longer in the Respondent's employ. She appeared to be open and communicative.

[41] Although the asserted July 24 cafeteria incident was litigated at the hearing, it was not alleged in the complaint.

[42] See fn. 18, *supra*.

[43] *N.L.R.B.* v. *McClure Associates, Inc.*, 556 F.2d 725 (4th Cir.), enfg. 223 NLRB 580 (1976); *Head Ski Division, AMF, Inc.*, 222 NLRB 161, 162, fn. 3 (1976).

[44] *Sure-Tan, Inc. and Surak Leather Co.*, 234 NLRB 1187, 1190 (1978).

[45] 241 NLRB 613 (1979).

fusal to work overtime on August 6 in protest of the Respondent's refusal to pay overtime. This is based on Walker's testimony that Cristin Rios' stated reason for refusing overtime on August 6 was his contention that the Respondent did not afford overtime pay.

This alternate theory was not advanced by the General Counsel before or during the hearing, and the first notice to the Respondent that such a contention would be made was by letter from the General Counsel, dated approximately 1 month after the close of the hearing, to the Respondent's attorneys. There, the General Counsel advised of its intention to include such an argument in its brief.[46]

The General Counsel's alternate theory is not timely presented. While there is some catchall standard language in the unamended complaint, the ground for discharge as stated in the alternate theory is very different from the litigated original contention that the Rioses were fired for supporting the Union. Had the time for filing not been extended, briefs would have been due on the date of the General Counsel's letter. The General Counsel's post-hearing letter advised that the Respondent was being notified that the alternate theory would be argued in "the interest of fair proceeding. "Yet fair proceeding does not less require that respondents be advised in advance of or even at the hearing, what they are being required to defend. A finding that this matter had been fully litigated so as to warrant determination on the merits would deprive the Respondent of such an opportunity.[47]

However, neither the record of this proceeding nor the *J. P. Hamer* case, *supra*, supports the General Counsel's new theory. In *J. P. Hamer*, unlike the present matter, the discriminatees there testified, consistent with complaint allegations, that they had left work an hour before the end of their shift on one occasion to concertedly protest the number of hours they were required to work. Although they did not give these reasons to the Respondent either before or after their work stoppage, the discriminatees did so at the hearing and described why their effort had been concerted. In the context of the record as a whole, such testimony established a violation. Here, the Rioses testified that they had refused to stay late only to be with their children. The Rioses, as were the discriminatees in *Hamer*, are the witnesses best qualified to testify as to why they had refused to work. The General Counsel, by inferentially arguing in support of the alternate theory that their testimony in this regard be discounted, merely reinforces the credibility resolutions heretofore made.

It, therefore, is found that the Rioses were not terminated in violation of Section 8(a)(1) of the Act because they concertedly refused to work overtime in furtherance of a dispute concerning overtime pay.[48]

CONCLUSIONS OF LAW

1. The Respondent, Poppin Fresh Pies, Inc., is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. National Production Workers Union, Local 707, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by preponderance of the evidence that the Respondent has engaged in, or is engaging in, unfair labor practices within the meaning Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[49]

IT IS ORDERED that the complaint be dismissed in its entirety.

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[46] A copy of this letter is appended to the Respondent's brief.

[47] *Squire Shops, Inc.*, 218 NLRB 158, fn. 1 (1975).

[48] In so concluding, it is noted from the credited evidence, contrary to Cristin Rios, that there was no pattern of nonpayment of overtime premium pay. There is but one documented instance where Cristin Rios did not receive 30 minutes of overtime pay. Hortencia Rios, who also worked late on that occasion, was paid for her time and does not independently claim entitlement to any unreceived overtime compensation.

[49] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.